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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 474

CALTEX (PHILIPPINES), INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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THE UNITED STATES,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner prays that a writ of certiorari issue to review the judgment entered in this case on July 13, 1954, by the United States Court of Claims.

Opinion Below.

The opinion of the Court of Claims, printed in Appendix A hereto, *infra* pp. 18-32, is reported in 122 F. Supp. 830.

Jurisdiction.

The judgment of the Court of Claims was entered on July 13, 1954. On October 4, 1954, the Chief Justice extended the time within which a petition for a writ of certiorari might be filed to and including December 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1), 1651(a) and 2101(c).

Questions Presented.

1. Whether the United States is liable to pay just compensation under the Fifth Amendment to the Constitution of the United States for petroleum products which have been within the exclusive control of the United States military forces and subject to continual withdrawals by such forces for their own use prior to a destruction of the products by them.

2. Whether an officer of the United States Army who is instructed during wartime to procure supplies in any manner he saw fit and who is in command of an advanced quartermaster depot has authority to take private property and thereby bind the government to pay just compensation under the Fifth Amendment to the Constitution of the United States.

Constitutional Provision.

> "• • • nor shall private property be taken for public use, without just compensation". U. S. Constitution, Amend. V.

Statement.

At the time of the Japanese attack on Pearl Harbor, petitioner was one of four commercial oil companies which for several years had been operating in the Philippine Islands (F1; R33). Among petitioner's properties in the Philippines was a terminal (containing substantial quantities of petroleum products) which was located in the Town of Opon on Mactan Island in Cebu Harbor (FF1, 11, 22; R33, 36, 39). This action was commenced to recover

just compensation for petroleum products in the Opon terminal taken by Colonel John D. Cook, United States Army, on December 8, 1941 (R3-9). In November 1951, the Court of Claims held that Standard-Vacuum Oil Company was entitled to recover just compensation for its petroleum products at Cebu which had been taken by Colonel Cook on December 8, 1941 (120 C. Cls. 518, 551-53). In July 1954, the Court of Claims held that the identical actions of the same Army officer at the same time did not constitute a "taking" of petitioner's products and accordingly ordered that the petition in the instant case be dismissed* (R27-33).

Several years prior to 1941, the United States Army, Philippine Department, began developing plans for the defense of the Philippine Islands in the event of attack (F3; R33). As early as 1940, the Army had sought and obtained information as to the amount of petroleum products on hand at Cebu (F5; R34). The outbreak of war in December 1941 found the Army with a limited war reserve of petroleum products on the Philippine Islands, none of which was on the Island of Cebu (F7; R35).

However, the Army did have an Advanced Quartermaster Depot at Cebu which had been established there to supply troops in the southern islands (F10; R36). This depot, which was activated some time in November 1941, was established on the recommendation of the Chief Quartermaster USAFFE (United States Armed Forces in the Far East) and with the approval of General Douglas MacArthur, who was in command of USAFFE (FF9-10; R35-36). Its commanding officer was Colonel John D.

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* After this decision the Government moved to be relieved from the determination of the Court of Claims in the *Standard-Vacuum* case. This motion was submitted on November 5, 1954 and has not been determined to date.

Cook who had final authority and responsibility within applicable regulations for the procurement, storage and distribution of supplies in the southern islands (F12; R36).

War between the United States and Japan commenced during the morning of December 8, 1941, Philippine time (F13; R37). At that time Colonel Cook was in Manila conferring with Quartermaster officers (F13; R37). He was then instructed "to procure supplies, including fuel, in any manner he saw fit" (F13; R37).* Colonel Cook returned to Cebu from Manila during the afternoon of December 8, 1941 and that evening called a conference of the Cebu representatives of the oil companies, including petitioner (FF13-14; R37).

At this meeting Colonel Cook announced (1) he was taking over all of the supplies of petroleum products at Cebu, and such of the facilities** as were necessary to make use of them, (2) he was freezing the price at the level of the contract price in the Manila depot and (3) the oil companies would be allowed to withdraw only such oil as was needed for essential public and civilian operations (F14; R37). The actions of Colonel Cook effectively deprived petitioner of its control over the stocks of petroleum products in its Opon terminal on and after December 8, 1941 (F16; R37). Within a few days after December 8, military patrols were stationed on petitioner's property (F17; R38).

Pursuant to Colonel Cook's request, the representatives of the oil companies, including petitioner, immediately com-

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* Although the Court of Claims found that the evidence does not establish that the officer who gave these instructions had power to requisition or the authority to delegate such power (F13; R37), the testimony of both Colonel Cook and General Drake (Chief Quartermaster, USAFFE) clearly supports a reasonable inference that the instructions came directly from General MacArthur's Headquarters (Cook, 141; Drake 449-449A, 476-77).

** No claim is made here that the facilities were taken—only products are involved.

menced placing the petroleum stocks in containers so that as much as possible could be removed from the terminals and dispersed (F18; R38). This dispersal continued until late in March 1942, when the supply of containers was exhausted (F19; R38). Petitioner kept a record of the products withdrawn from its terminal, but no billing was made because Colonel Cook advised that no funds were available to pay for them (F18; R38).

During the latter part of December 1941, substantial quantities of the petroleum products then in the Opon terminal, which was under the exclusive control of the Army, were destroyed by enemy air raids (FF16, 23; R37, 39).

Colonel Cook made plans for the destruction of the Opon terminals and all products remaining in them to prevent their falling into the hands of the enemy (F20; R38). These plans were executed early in the morning of April 10, 1942, when Japanese troops were offshore beginning the invasion of Cebu (F20; R38). All products remaining in the terminal were destroyed; the United States refused to pay for the products destroyed either by the enemy or by itself while in its exclusive control and this suit resulted (FF20-21; R38). The volume of products involved is as follows:

	Destruction by Air Raids	Destruction by U. S. Army
kerosene (in gallons)		83,274
gasoline (in gallons)	43,911	19,074
diesel oil (in gallons)	318,117	469,460

(FF23, 25; R39)

The Court of Claims held (1) there was no taking of petitioner's products on December 8, 1941, (2) the officer who acted on behalf of the United States lacked authority to take the products and (3) there was no ratification of the officer's acts (R27-33). In view of its conclusion that petitioner is not entitled to recover, the Court made no findings as to the value of the products here involved.

Reasons For Granting The Writ.

I.

In holding that petitioner was not entitled to recover just compensation for the petroleum products here involved, the Court of Claims expressly refused to follow its own decision, rendered in November 1951, in *Standard-Vacuum Oil Company* v. *United States** (120 C. Cls. 518, 551-53). The Court gave no reason for its action other than to state that its earlier decision "was in error".

The events which establish the liability of the government in both actions are exactly the same. Both involved claims for just compensation for petroleum products taken at Cebu, Philippine Islands on December 8, 1941 by Colonel John D. Cook of the United States Army. At a meeting called by him on December 8, 1941, Colonel Cook announced the taking to Cebu representatives of all the oil companies (including petitioner and Standard-Vacuum). Military patrols were stationed at the terminals of both companies within a few days after December 8, 1941; no products could be withdrawn from the respective terminals without Army approval; products from both terminals were dispersed to supply dumps; the products remaining in both terminals on April 10, 1942 were destroyed by the Army to prevent their falling into enemy hands.

The findings of the Court of Claims in the two cases are essentially the same. For comparison purposes, the basic findings are set out below:

Standard-Vacuum Action	Caltex (Philippines), Inc. Action
"37. In November 1941, the Chief Quartermaster, USAFFE, arranged for the dispatch of an officer of the	"12. In November 1941, orders initiated by the Chief Quartermaster, USAFFE, were issued relieving Colonel

* The findings of fact and opinion in that case are printed herein as Appendix B *infra* pp. 33-44.

Standard-Vacuum Action

Quartermaster Corps to Cebu to establish and command an advance Quartermaster Depot. This depot commander was authorized and directed to procure supplies for USAFFE, including petroleum products, for use in the southern islands of the Philippines, and to exercise his discretion as to the manner of procurement.

"Upon investigation the depot commander found that USAFFE had no bulk stocks of petroleum products in or near Cebu, and only a negligible amount of petroleum products in drums. It had been determined at USAFFE headquarters not to send supplies of petroleum products to Cebu from Manila. The only supplies of such products in the Cebu area were those of the oil companies."

Caltex (Philippines), Inc. Action

John D. Cook as Harbor Defense Quartermaster at Corregidor and directing him to proceed to Cebu and there to establish and command an Advanced Quartermaster Depot. As commander of the depot, Colonel Cook had final authority and responsibility, within applicable regulations, for the procurement, storage, and distribution of supplies in the southern islands. Under Army regulations applicable to his operations in time of peace, he was required to purchase the supplies which he obtained from civilian owners. He lacked authority, unless and until specifically granted by higher authority, to seize or commandeer private property."

"13. Colonel Cook arrived in Cebu in late November 1941, after a series of conferences in Manila. He returned to Manila for further conferences with quartermaster officers on December 5, 6, and 7, 1941. He left Manila at noon on December 8, 1941, and arrived in Cebu about 3:30 o'clock that afternoon. War between the United States and Japan had begun during the morning of December 8, 1941, Philippine time. After the beginning of hostilities and before Colonel Cook left Manila, he was instructed to procure supplies, including

Standard-Vacuum Action

"38. On December 8, 1941, the Cebu depot commander called a meeting of representatives of the oil companies and declared (1) that in the name of USAFFE he was taking over all their supplies of petroleum products and (2) that he was freezing the price of such products at the current Army contract rate. He further stated that the oil companies would be allowed to take out a certain amount of stock from their terminals for the use of the local government and such civilian agencies as were essential to the economy."

Caltex (Philippines), Inc. Action

fuel, in any manner he saw fit.

"The evidence does not establish that the officer who gave him these instructions had the power to requisition, or the authority to delegate the power of requisition.*

"It is not established by the evidence (1) that a delegation of authority to seize private property in Cebu was made by the Commanding General of USAFFE or other officer commanding a theater of operations, or (2) that Colonel Cook was at any time the commanding officer of a theater of operations."*

"14. On December 8, 1941, in an evening conference with Cebu representatives of the oil companies, including plaintiff, Colonel Cook announced that, because of the war, and because the oil supplies at Cebu were the only supplies in the Philippines outside of Manila, he was taking over all of the supplies, and such of the facilities as were necessary to make use of them; that he was freezing the price at the level of the contract price in the Manila depot; and that the oil companies would be allowed to withdraw only such oil as was needed for

* As shown *supra* p. 4, the evidence in the record supports an inference that Colonel Cook's instructions came directly from Headquarters, USAFFE.

Standard-Vacuum Action

"39. Within a few days after December 8, 1941, the depot commander had established control over the oil companies' terminals and had placed military patrols. An order was issued by him that no petroleum products should be withdrawn without approval by him or his authorized representative.

"Work was begun on the packaging of petroleum products in tins or drums and the removal of such products for use or for dispersal to warehouses and supply dumps for protection against possible enemy bombing.

"Records were maintained of the amounts of petroleum stocks (1) removed and (2) on hand at the terminals. Petroleum products released to civilians or for civilian purposes were recorded as stock credits against the amount initially taken by and for the Army. The oil companies were permitted to charge for the amounts so released at prices obtaining for local civilian use.

"During the course of this operation some bills were submitted by Standard to the Army for petroleum products removed from its Opon terminal for use or dispersal by the Army. It is not established by the evidence that any of such bills was or was not paid."

Caltex (Philippines), Inc. Action

essential public and civilian operations."

"17. Incident to the 'taking over' by the Army, Colonel Cook requested the oil companies' representatives to place guards on their properties until military patrols could be furnished. The companies complied. Military patrols replaced the civilian guards within a few days."

"18. Also incident to the 'taking over' by the Army, Colonel Cook requested the representatives of the oil companies to begin at once placing the petroleum stocks in containers (large metal drums and smaller cans) to the end that as much as possible might be moved from the terminals and dispersed. The companies complied as rapidly as containers could be obtained.

"Plaintiff's representative in Cebu kept a record of the stocks withdrawn in packages by the Army from the Opon terminal. No billing therefor was made by plaintiff at that time, because of advice from Colonel Cook that there were no funds with which to pay for them."

In addition to the fact that both the *Standard-Vacuum* case and the instant case involved the precise same events, the testimony in both cases on the issue of liability was substantially the same. The entire testimony of Colonel Cook, taken in the instant action on February 17, 1949, was incorporated by stipulation into the Standard-Vacuum record on March 10, 1949 and marked Plaintiffs' Joint Exhibit 6 in that action. Colonel Cook was the only military officer, present at Cebu in December 1941, who testified in either case. The oil company representatives who testified in the *Standard-Vacuum* case and in the instant case corroborated the testimony of Colonel Cook as to what was said and done on December 8, 1941 and thereafter.

In the *Standard-Vacuum* case, the Court of Claims, in November 1951, held:

> 1. "On December 8 the Depot Commander actually requisitioned these products" (i.e., the petroleum products in the Standard-Vacuum terminal on that date) (*infra*, p. 38).
>
> 2. "The Depot Commander's actions permitting the oil companies to take out a certain amount of their stock for the use of the local government and their civilian agencies, subject to the approval of the Depot Commander, were not inconsistent with an act of taking or requisition" (*infra*, pp. 38-39).
>
> 3. "As of December 8, 1941, when the Army took title to the petroleum products in Standard's Opon terminal, it did not take them for destruction. It took them and used them for approximately four months" (*infra*, p. 39).

The Court rejected the government's contention that the "action of the Depot Commander amounted merely to the establishment of a priority system for Standard's petro-

leum products" (*infra*, p. 38). The conclusion of the Court was expressed as follows:

> "We conclude that the Depot Commander, with full authority to do so, took Standard's petroleum products for the United States on December 8, 1941, not for destruction, but for use, and Standard is clearly entitled to just compensation for its products so taken" (*infra*, p. 39).

Included in Standard-Vacuum's action to recover just compensation for its products at Cebu was a claim to recover for its terminal facilities at Pandacan (Manila). That action was consolidated with an action by petitioner herein, to recover for its terminal facilities at Pandacan. Although the government sought and obtained a review by this Court of the judgment holding it liable in respect of the Pandacan terminal facilities,* the government did not seek a review of the judgment in so far as it related to Standard-Vacuum's petroleum stocks at Cebu—which the Court of Claims held were taken by the Army, not for destruction (in order to deny their use to the enemy) but for actual use by the Army. Thus when the instant case, based on substantially the same record, was presented to the Court of Claims, its own earlier decision stood unimpaired.

Instead of following the precedent it had established less than three years earlier, the Court of Claims in the instant case expressly reversed itself holding (1) there was no taking of petitioner's property on December 8, 1941 and (2) Colonel Cook lacked authority to requisition private property. Where in 1951 it had said "The Depot Commander's actions permitting the oil companies to take out a certain amount of their stock for the use of the local

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* *United States* v. *Caltex (Philippines), Inc., et al.*, 344 U. S. 149 (1952).

government and their civilian agencies, subject to the approval of the Depot Commander, were not inconsistent with an act of taking or requisition" (*infra*, pp. 38-39), in 1954 it said "His (Colonel Cook's) order permitting the oil companies to sell some of them to public and private institutions is inconsistent with an appropriation of them by defendant" (R30). Where in 1951 it rejected the government's contention that the actions of Colonel Cook amounted merely to the establishment of a priority system (*infra*, p. 38), in 1954 it held that what Colonel Cook did on December 8 "amounted to no more than the exercising of reasonable control over, and the placing of reasonable restrictions on the disposition of plaintiff's property, and the price to be obtained therefor, for the purpose of conserving and protecting them for subsequent possible use" (R29). Where in 1951 it had held that Colonel Cook took Standard-Vacuum's products "with full authority to do so" (*infra*, p. 39), in 1954 it held that "Colonel Cook is not shown to have had the authority to seize it" (R32).

As previously stated, the Court of Claims gave no reason for overruling its decision in the *Standard-Vacuum* case other than to state "This was in error, and to the extent that the opinion and decision in that case is inconsistent with what we have said above, they are overruled" (R33).

From the foregoing it is obvious that the decision of the Court below is in direct conflict with its own decision rendered less than three years earlier. Review by this Court under these circumstances is fully warranted.

II.

Although the Court of Claims cited no authority for its holding in the Standard-Vacuum Cebu decision, there is ample judicial authority for the proposition that where the

government forbids an owner of property to make any use of it other than to sell it to the government or its designee, there is a "taking" within the meaning of the Fifth Amendment.

Edward P. Stahel & Co., Inc. et al. v. *United States,* 111 C. Cls. 682, cert. den. 336 U. S. 951 (1949);
Safeway Stores Inc. v. *United States,* 118 C. Cls. 73, cert. den. 341 U. S. 953 (1951);
Dore et al. v. *United States,* 119 C. Cls. 560 (1951).

It is well established that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the "taking" under the Fifth Amendment.

United States v. *Welch,* 217 U. S. 333 (1910);
Richards v. *Washington Terminal Co.,* 233 U. S. 546 (1914);
United States v. *General Motors Corp.,* 323 U. S. 373, 378 (1945).

In the latter case it was held that where the government destroys property, even temporarily in its possession, it must provide just compensation to the owner. So in the instant case, where petitioner's property was destroyed while in the exclusive control of the government and guarded by military patrols, just compensation should be paid.

The cases relied on by the Court of Claims, in overruling its decision in the *Standard-Vacuum* case and holding that petitioner here is not entitled to recover just compensation, are not controlling on the facts here presented. All of those cases were decided under or involved an interpretation of various legislative enactments imposing emergency measures of regulation or control. *Bowles* v. *Willingham,* 321

U. S. 503 (1944) and *Snyder* v. *United States*, 113 C. Cls. 61 (1949), both involved federal rent control statutes. *Neumaticos Goodyear, S. A.* v. *United States*, 109 C. Cls. 535 (1947) and *Foreign Trade Management Co.* v. *United States*, 109 C. Cls. 587 (1947) involved general restrictions on exports. *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271 (1948), construed the effect of orders of the War Production Board on plaintiff's property. All of the cases involved statutes of general effect, not limited to the particular plaintiff. In none of the cases was there a semblance of physical control of the property such as is present here. In none of the cases were the plaintiffs required to do anything with their property—the regulations affected them only if they chose to act. In none of the cases were the plaintiffs deprived of property as a result of the control. In contrast with those cases, the Court of Claims here found that the petitioner, on and after December 8, 1941 was effectively deprived of its control over the stock of petroleum products in its Opon terminal as a direct result of the acts of Colonel Cook. While this Army control was in effect the property was destroyed. Under these circumstances, the language of this Court in *United States* v. *Pewee Coal Co., Inc.*, 341 U. S. 114, 118-19 (1951) is particularly appropriate:

> "• • • Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control. By doing so, it became the proprietor and, in the absence of contrary arrangements, was entitled to the benefits and subject to the liabilities which that status involves."

III.

Over one hundred years ago in *Mitchell* v. *Harmony*, 54 U. S. 115 (1851), this Court considered the question of the extent of the authority of a military officer during wartime to take private property and bind the government to make full compensation to the owner. There plaintiff sued Colonel Mitchell in trespass, for the allegedly unauthorized taking of his property during the Mexican war. Colonel Mitchell defended on the ground that he had taken the property for public use and, hence, he was not personally liable. This Court ruled that there are two sets of circumstances under which the officer may bind the government, (1) when the danger from the enemy is immediate and impending or (2) when the necessity for the public service is such as to preclude the delay attendant in obtaining civil authority to provide the needs of the occasion. That there are two separate and independent situations is shown by the following quote from this Court's opinion (54 U. S. 134):

> "But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; *or* the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger *or* necessity in which this power may be lawfully exercised." (Emphasis supplied.)

The Court of Claims both in its decision in the instant case and in its opinion in *Charles N. Hodges* v. *United States*, 125 C. Cls. 405 (1953) (upon which it principally relied below*), has clearly overlooked the fact that there

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* *United States* v. *North American Company*, 253 U. S. 330, also cited by the Court below, involved a taking of property during peacetime and obviously does not control a wartime taking such as is here involved.

are two separate and distinct phases to the rule enunciated in *Mitchell* v. *Harmony*. Under these recent decisions of the Court of Claims only an immediate and impending danger of enemy attack justifies action by a military officer. The second phase of the rule, the necessity for public service, has been completely eliminated.

Thus in the *Hodges* case, the Court of Claims stated:

> "The United States may become liable to pay for property requisitioned by an army in the field, but only when its taking is demanded by an emergency, by a danger which is immediate and impending and which will not admit of the delay necessary to secure action by civil authority" (125 C. Cls. 411).

And in the instant case, in holding that Colonel Cook lacked authority to take petitioner's products and bind the United States to pay therefor, the Court said:

> "It cannot be said in this case that on December 8, 1941, the danger to American forces in and around Cebu, 350 miles from the point of attack, was so immediate and impending as to admit of no delay" (R31).

From the foregoing it is obvious that the Court of Claims has erroneously construed the holding of this Court in *Mitchell* v. *Harmony*. Where this Court held there were two distinct situations in which the military officer in the field could bind the government, the Court of Claims has fused the two situations into one, thereby destroying one of them.

Under either of the two alternatives set forth in the *Mitchell* case, Colonel Cook had authority to bind the government to pay compensation for the taking of petitioner's products. To hold, as the Court of Claims here did, that on December 8, 1941 the danger at Cebu was

not immediate and impending, it to totally disregard the realities of modern warfare. A distance of three hundred and fifty miles is negligible when an enemy can attack by planes, paratroops and submarines. Furthermore, the necessity for the public service at the time of taking would not admit of the delay attendant on securing civil authority. Had Colonel Cook delayed and allowed petitioner or any of the commercial oil companies at Cebu to continue operating as in peacetime, he would have run the risk of the Army losing the only possible source of petroleum supplies at Cebu. With this risk facing him, he decided to take prompt and effective action. The government should not be allowed to avoid now the liability then imposed on it by Colonel Cook's acts.

This Court should grant a writ of certiorari and reaffirm the rule first established over one hundred years ago in *Mitchell* v. *Harmony*.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 10, 1954.

Appendix A.

Opinion and Findings of Fact Below.

IN THE

UNITED STATES COURT OF CLAIMS

No. 48322

(Decided July 13, 1954)

CALTEX (PHILIPPINES), INC., v. THE UNITED STATES

OPINION

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff sues to recover just compensation for its petroleum products stored at Cebu, Philippine Islands, which it alleges the defendant seized on December 8, 1941, immediately following the attack on the Philippines by Japan.

In November 1941 the Chief Quartermaster of the United States Armed Forces in the Far East, designated as USAFFE, ordered Colonel John D. Cook to proceed to Cebu and there to establish an Advanced Quartermaster Depot, of which he was to take command. This Advanced Depot was established to supply the Philippine Army which was then being mobilized and integrated into the Army of the United States. Colonel Cook proceeded to Cebu as ordered in late November 1941. He returned to Manila for conferences with the Office of the Chief Quartermaster, which were held on December 5, 6, and 7, 1941. He left Manila for Cebu at noon on December 8, 1941, after the Japanese had attacked the Island of Luzon in the Philippines. Cebu is one of the smaller islands of the Philippine archipelago about 350 miles south of Manila.

Upon his arrival in Cebu he called a conference with the representatives of the several oil companies having petroleum products stored at Cebu, including plaintiff, at which he advised them that he was freezing the price of such products at the level of the price being paid for them by the Army at the Manila depot, and that the oil companies would be allowed to dispose of only such amount of their products at Cebu as might be needed for essential public and civilian operations. A few days later military patrols were placed on their properties.

Thereafter, the oil companies were ordered by Colonel Cook to transfer as much of their petroleum products to various dispersal points designated by him as possible, depending upon the number of oil drums they could secure to hold the oil. The supply of drums was scarce, but the oil companies secured as many of them as they could and removed as much of their petroleum products to the dispersal points indicated as they could find drums to contain them. The last of the products removed in drums was removed some time in March 1942.

For all of the products removed in drums to the dispersal points indicated plaintiff has been paid by the defendant.

In the meantime, plaintiff was permitted to sell its products for essential public and private use, with the approval of the Commander of the Advanced Quartermaster Depot.

Early in the morning of April 10, 1942, the Japanese troops were just offshore of Cebu and preparing to land. Thereupon, in performance of a prearranged plan, Colonel Cook ordered all remaining petroleum products on Cebu destroyed, to prevent them from falling into the hands of the enemy. This was done.

For the destruction of plaintiff's petroleum products on Cebu on April 10, 1942, which had not already been taken defendant is not liable. *United States* v. *Caltex (Philippines), Inc., et al.*, 344 U. S. 149. The case cited involved plaintiff's facilities at Manila and determines

the defendant's liability to plaintiff for the destruction of its products at Cebu.

As stated above, for plaintiff's products which were removed to dispersal points under orders of defendant, plaintiff has been paid. Defendant converted to its own use none of plaintiff's products, except those which were removed in drums to the dispersal points.

It follows that defendant is not liable to plaintiff, unless Colonel Cook's actions on December 8, at which time he had exercised control over, and placed restrictions upon, the disposition of plaintiff's properties for the purpose of conserving them for possible use subsequently, amounted to a taking thereof under authority conferred upon him by the defendant, or was an unauthorized taking that was subsequently ratified. If what he did at that time amounted to a taking, and if at that time he was authorized to seize all of plaintiff's products, or if his action was subsequently ratified, defendant would be liable not only for that removed in drums, which has been paid for, but also for all products later disposed of to private persons or other public institutions, less a credit for the amount received for them, and also for that destroyed upon the landing of Japanese forces.

The principal questions, then, are, first, whether or not Colonel Cook did on December 8, 1941, in fact take plaintiff's property for public use; second, whether or not he had authority at that time to take the property; and third, whether or not someone having authority ratified his action if he lacked authority.

1. We do not think what Colonel Cook did on December 8 amounted to a taking of plaintiff's products. What he did at that time amounted to no more than the exercising of reasonable control over, and the placing of reasonable restrictions on the disposition of plaintiff's property, and the price to be obtained therefor, for the purpose of conserving and protecting them for subsequent possible use. This is evidenced by the fact that plaintiff thereafter was

permitted to sell its products to private persons or private institutions and to public institutions, and to receive payment therefor, and to put the money into its own treasury, without making any account to the defendant.

It was defendant's intention to appropriate for its own use so much of the products as the oil companies could remove to the designated dispersal points in drums, but it did not intend to appropriate, because it could not use, that part not so removed. During the four months between Colonel Cook's conference with representatives of the oil companies and the landing of the Japanese on Cebu the defendant used, in fact, only those products that had been removed to the dispersal points.

The Commissioner has found in finding 14 that Colonel Cook told representatives of the oil companies that "he was taking over all of the [oil] supplies, and such of the facilities as were necessary to make use of them; that he was freezing the price at the level of the contract price in Manila depot; and that the oil companies would be allowed to withdraw only such oil as was needed for essential public and civilian operations."

By the expression "taking over" Colonel Cook could have meant only that he was placing controls on these products to conserve them for subsequent use. It did not mean that he was condemning these products for the use of the defendant. His freezing of the price which the oil companies could get for their products is inconsistent with an appropriation of them by defendant. His order permitting the oil companies to sell some of them to public and private institutions is inconsistent with an appropriation of them by defendant. His later use of only that part removed to dispersal points and the use of none other is inconsistent with an appropriation.

The exercise of control over, and the placing of restriction on the disposition of plaintiff's products for the purpose of conserving them did not amount to a taking. *Bowles* v. *Willingham*, 321 U. S. 503; *Neumaticos Goodyear, S. A.* v. *United States*, 109 C. Cls. 535; *Foreign Trade*

Management Co. v. *United States*, 109 C. Cls. 587; *Snyder* v. *United States*, 113 C. Cls. 61; *St. Regis Paper Company* v. *United States*, 110 C. Cls. 271, cert. den. 335 U. S. 815.

2. Furthermore, the proof falls far short of establishing authority in Colonel Cook to seize and condemn all of plaintiff's products on December 8, 1941. The extent of the proof is that Colonel Cook was instructed to set up this Advanced Quartermaster Depot in order to supply the units of the Philippine Army located on Cebu and surrounding islands, but the way in which these supplies were to be obtained is not shown.

Colonel Cook in his testimony says that he was instructed to procure supplies "in any manner he saw fit"; but even if we assume that these instructions were sufficiently broad to include the requisitioning of private property, which we do not believe they were, the evidence fails to show that the officer giving such instruction had authority to requisition private property, or the authority to delegate such power. Property is never requisitioned, that is, seized or condemned under the power of eminent domain, where it can be secured by agreement with the owner, unless the exigencies of the case demand it. There is no showing whatever that Colonel Cook undertook to purchase plaintiff's oil stocks, and that plaintiff refused to sell them, and certainly no emergency has been shown to have existed on December 8, 1941, which on that date would have authorized Colonel Cook to seize plaintiff's products, on plaintiff's refusal to sell them.

The authority to take private property for public use must be granted by Congress, either prior to the taking or subsequent thereto by ratification, subject to the exception that a Commander of an Army in the field may do so where the danger that necesitates its taking is immediate and impending and admits of no delay. This subject was discussed somewhat at length by us in the case of *Charles N. Hodges* v. *United States*, 125 C. Cls. 405. It appears from the authorities cited in that opinion that a Commander in

the field has no authority to take private property for public use unless "its taking is demanded by an emergency, by a danger which is immediate and impending and which will not admit of the delay necessary to secure action by civil authority."

It cannot be said in this case that on December 8, 1941, the danger to American forces in and around Cebu, 350 miles from the point of attack, was so immediate and impending as to admit of no delay. In the absence of such circumstances, express authority for the taking must be shown in the officer who takes. In *United States* v. *North American Company*, 253 U. S. 330, 333-334, it appeared that Congress had authorized the Secretary of War to acquire certain property taken by General Randall, the Commander of the Department of Alaska, but it did not appear that the Secretary of War had delegated his authority to General Randall and, therefore, it was held that General Randall's action was unauthorized and, therefore, did not subject the United States to liability therefor. The Supreme Court said:

> • • • But although Congress may have conferred upon the Executive Department power to take land for a given purpose, the Government will not be deemed to have so appropriated private property, merely because some officer thereafter takes possession of it with a view to effectuating the general purpose of Congress. See *Ball Engineering Co.* v. *J. G. White & Co.*, 250 U. S. 46, 54-57. In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power.

Plaintiff is not entitled to recover both on the ground that Colonel Cook's action on December 8, 1941, did not amount to a seizure of plaintiff's property for the use of

the defendant, and also on the ground that Colonel Cook is not shown to have had the authority to seize it.

3. The record fails to show that Colonel Cook's action on December 8, 1941, was ratified by anyone having the power to requisition private property for public use.

In the former case in this court of *Caltex (Philippines), Inc., et al.* v. *United States,* 120 C. Cls. 518, all three oil companies, Caltex, Shell and Standard-Vacuum, sought to recover for the destruction of their facilities at Pandacan on the Island of Luzon, when they were in imminent danger of capture by the Japanese, but the Standard-Vacuum Oil Company sought also to recover for its petroleum stocks on Cebu, which were destroyed under orders of the defendant immediately before the Japanese landed on Cebu. The present plaintiff interposed no such claim, but rested its case alone on the destruction of its facilities at Pandacan. The defendant in its brief relied on its argument in defense of the Pandacan claim to defeat Standard-Vacuum Oil Company's claim with reference to its stocks on Cebu.

The attention of the court was centered on the Pandacan claim; but we did allow recovery for Standard's oil products on Cebu on the theory that there had been a taking of them by Colonel Cook on December 8, 1941. This was in error, and to the extent that the opinion and decision in that case is inconsistent with what we have said above, they are overruled.

Plaintiff's petition must be dismissed.

It is so ordered.

LARAMORE, Judge; MADDEN, Judge; LITTLETON, Judge; and JONES, Chief Judge, concur.

FINDINGS OF FACT

The court having considered the evidence, the report of Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows :

1. At the time of the Japanese attack on Pearl Harbor, four commercial oil companies, including plaintiff, were

operating in the Philippine Islands. For several years before Pearl Harbor, each of the four companies had maintained terminals at Pandacan (Manila) on the Island of Luzon and auxiliary facilities in the harbor of the Island of Cebu.

2. The petroleum stocks stored by the oil companies at Cebu did not enter into the Army's plans for the defense of the Philippines, in any important respect, prior to November 1941, when an advanced quartermaster depot was established at Cebu to supply a portion of the Philippine Army, then being integrated with the Army of the United States. Prior to November 1941 the Army had made purchases from time to time from the Cebu supplies, and had a contract with one of the oil companies (not plaintiff) for the supply of petroleum products on call at an agreed price.

3. The development of plans for the defense of the Philippine Islands in the event of attack was begun several years prior to 1941 by the United States Army, Philippine Department. These plans were incorporated in a formal, written compendium known as the Philippine Department Plan—Orange, which was subject to continual refinement. The Orange Plan related primarily to the Island of Luzon. It called for defensive action at the beaches of Luzon in the event of enemy landings, to be followed by a slow withdrawal of Army forces to Bataan peninsula, the defense to continue over a period of 180 days, using personnel, and supplies available locally.

4. In planning for the day of emergency (M-Day in the Orange Plan), the Department Quartermaster never acquired or intended to acquire, before M-Day arrived, extensive supplies of petroleum products or extensive facilities for storage, handling, and distribution of such products. The Quartermaster planning was predicated upon the storage, handling, and distribution facilities and the petroleum stocks of the commercial oil companies operating in Manila.

In the refinement of the Orange Plan, 1940 Revision, it was contemplated that the G-4 (Supplies and Logistics) Annex would contain a section to be known as the gasoline supply plan, which was to be prepared by and under the supervision of the Department Quartermaster. A gasoline supply plan was developed by the Department Quartermaster and his staff in 1940 and was revised in 1941. No copy of the written statement of the gasoline supply plan was available for use in evidence in this case.

5. In June 1940, the Commanding General, Philippine Department, held a conference with officers under his command, following which work was begun in earnest on the 1940 revision of the Orange Plan. Data were obtained from the oil companies as to (1) the nature of their facilities for the storage, handling, and distribution of petroleum products and (2) the amount of such products on hand from time to time. As part of this survey various Army officers inquired from time to time and were told the amount of petroleum products on hand at Cebu. The Department Quartermaster determined that Army personnel would not be available to operate the oil companies' facilities and that, in the event of emergency, the Army's chief reliance for petroleum products on the Island of Luzon would fall upon the oil companies' personnel, as well as their stocks and facilities.

6. The owner's representative in charge of one of the terminals at Pandacan had been placed there by his company for the specific purpose of dealing with the increasing problems of defense. Prior to June 1941, he had had conversations with officers of all of the armed forces, the Army, the Navy, and the Air Force, concerning their needs for oil in the event of war. He was fully conversant with the intention of the Army Quartermaster Corps to rely, in the event of war, upon the supplies, facilities, and personnel of the oil companies for the supply, storage, handling, and distribution of petroleum products on Luzon. He referred to these plans in terms of the Army "taking over," as did

representatives of other oil companies and many Army officers, then and later.

7. In June 1941, the Army's needs for petroleum products were obtained from the oil companies, by contract, on a day by day call or delivery to the different Army stations throughout the Philippines. This situation had obtained for several years and continued unchanged into December 1941. The Army had limited stocks of petroleum products in the nature of a war reserve. None of the reserve was on the island of Cebu.

8. In June 1941, the Department Quartermaster called a conference of officers on his staff and Manila representatives of the oil companies. Each of the oil companies was represented at the conference. The officer who conducted the conference for the Department Quartermaster reviewed the necessity for the Army to rely upon the oil companies in the event of war and stressed two points: (1) the need of the Army for petroleum products to the extent of at least 50 per cent of the volume storage capacity of the Pandacan terminals, and (2) the Army's need to rely upon the personnel and facilities of the oil companies to handle and distribute the petroleum products. The oil companies readily agreed to make their personnel and facilities available if and when the Army "took over" in the event of war.

9. On July 28, 1941, the command known as USAFFE (United States Armed Forces in the Far East) was created, and General Douglas MacArthur was placed in command. The Philippine Department, United States Army, was continued in the echelon of command under Headquarters, USAFFE.

The officer who was then Department Quartermaster became Chief Quartermaster, USAFFE. He continued to discharge the duties of both offices until October 25, 1941, when he was relieved as Department Quartermaster.

In November 1941, after the former Commanding General of the Philippine Department of the Army had been

relieved and assigned to other duties, the Philippine Department was absorbed in the USAFFE Field Service Command, which was thereafter sometimes referred to as the Philippine Department Service Command. General MacArthur retained command of the Philippine Department Service Command as well as USAFFE. The order establishing the USAFFE Field Service Command and defining its functions was vague in defining and limiting the duties of control, administration, operation, and maintenance to the various echelons of command, and caused some confusion in the minds of the officers charged with the duties above mentioned.

10. Shortly after the organization of USAFFE, plans were formulated for the integration into it of the Philippine Army, which was then in course of mobilization. The Chief Quartermaster, USAFFE, was directed to prepare plans for the supply of the Philippine Army, and to take over its supply beginning December 1, 1941. Inasmuch as three or four of the Philippine Army divisions were to be mobilized in the southern islands, where there were no United States Army troops and no supplies, the Chief Quartermaster, USAFFE, recommended and General MacArthur approved a plan for the establishment of an advanced quartermaster depot at Cebu. This depot was activated some time in November 1941.

11. Plaintiff's Cebu facilities were located in the town of Opon on Mactan Island, in Cebu Harbor. Its offices were in the City of Cebu, on the Island of Cebu.

12. In November 1941, orders initiated by the Chief Quartermaster, USAFFE, were issued relieving Colonel John D. Cook as Harbor Defense Quartermaster at Corregidor and directing him to proceed to Cebu and there to establish and command an Advanced Quartermaster Depot. As commander of the depot, Colonel Cook had final authority and responsibility, within applicable regulations, for the procurement, storage, and distribution of supplies in the

southern islands. Under Army regulations applicable to his operations in time of peace, he was required to purchase the supplies which he obtained from civilian owners. He lacked authority, unless and until specifically granted by higher authority, to seize or commandeer private property.

13. Colonel Cook arrived in Cebu in late November 1941, after a series of conferences in Manila. He returned to Manila for further conferences with quartermaster officers on December 5, 6, and 7, 1941. He left Manila at noon on December 8, 1941, and arrived in Cebu about 3:30 o'clock that afternoon. War between the United States and Japan had begun during the morning of December 8, 1941, Philippine time. After the beginning of hostilities and before Colonel Cook left Manila, he was instructed to procure supplies, including fuel, in any manner he saw fit.

The evidence does not establish that the officer who gave him these instructions had the power to requisition, or the authority to delegate the power of requisition.

It is not established by the evidence (1) that a delegation of authority to seize private property in Cebu was made by the Commanding General of USAFFE or other officer commanding a theater of operations, or (2) that Colonel Cook was at any time the commanding officer of a theater of operations.

14. On December 8, 1941, in an evening conference with Cebu representatives of the oil companies, including plaintiff, Colonel Cook announced that, because of the war, and because the oil supplies at Cebu were the only supplies in the Philippines outside of Manila, he was taking over all of the supplies, and such of the facilities as were necessary to make use of them; that he was freezing the price at the level of the contract price in the Manila depot; and that the oil companies would be allowed to withdraw only such oil as was needed for essential public and civilian operations.

15. It is not established by the evidence that Colonel Cook intended, on December 8, 1941, to requisition (in the

sense of seizing or commandeering) the oil supplies of plaintiff and the other companies. He did intend (1) to sequester and conserve them, (2) to use such of them as might be needed, and (3) to make payment at a stated price. Whether he intended to pay only for such supplies as were used, or to pay for all supplies on hand, is not established by the evidence.

16. Regardless of Colonel Cook's intentions in the matter, his actions effectively deprived plaintiff of its control over, but did not deprive it of its interest in, the stock of petroleum products in its Opon terminal on and after December 8, 1941.

17. Incident to the "taking over" by the Army, Colonel Cook requested the oil companies' representatives to place guards on their properties until military patrols could be furnished. The companies complied. Military patrols replaced the civilian guards within a few days.

18. Also incident to the "taking over" by the Army, Colonel Cook requested the representatives of the oil companies to begin at once placing the petroleum stocks in containers (large metal drums and smaller cans) to the end that as much as possible might be moved from the terminals and dispersed. The companies complied as rapidly as containers could be obtained.

Plaintiff's representative in Cebu kept a record of the stocks withdrawn in packages by the Army from the Opon terminal. No billing therefor was made by plaintiff at that time, because of advice from Colonel Cook that there were no funds with which to pay for them.

19. The removal and dispersal of petroleum products in portable containers was continued intermittently, as cans and drums could be found.

Late in March 1942, the supply of containers was exhausted. At that time the Army's requirements were being supplied from the dispersal dumps on Cebu. When

the movement of packaged products was stopped, an unspecified quantity of oil at plaintiff's terminal had been packaged, but not removed.

20. Plans for the destruction of the Opon terminals, including the facilities and all petroleum stocks remaining in them, to prevent their falling into the hands of the enemy, were made by Colonel Cook. Early in the morning of April 10, 1942, when Japanese troops were just offshore and beginning their landings on Cebu, the plans were executed. Plaintiff's Opon terminal and all of the petroleum products remaining in it were destroyed.

21. Plaintiff has been paid by the Army for the petroleum products removed from the Opon terminal and shipped to dispersal dumps on Cebu. The amount so paid is not established by the evidence.

The United States has refused to pay plaintiff for the petroleum products not removed from plaintiff's Opon terminal.

22. On December 1, 1941, plaintiff had in bulk storage at its Opon terminal 347,139 gallons of kerosene, 720,496 gallons of gasoline, and 1,223,905 gallons of diesel oil. No additional petroleum products were received into Opon terminal after December 1, 1941. The exact amounts of the various products on hand on December 8, 1941, are not in evidence. The stocks had not been substantially depleted during the days intervening between December 1 and December 8.

23. Some of the products not removed from the terminal were destroyed by enemy air raids on December 22 and 30, 1941, before the terminal was demolished. The amounts so destroyed were 43,911 gallons of gasoline and 318,117 gallons of diesel oil.

24. The products withdrawn, packaged, and removed by the Army were 264,965 gallons of kerosene, 662,444 gal-

lons of gasoline, and 386,270 gallons of diesel oil. Additional diesel oil to the extent of 45,486 gallons was loaded on a tanker.

25. Products destroyed by demolition of the terminal on April 10, 1942, were 83,274 gallons of kerosene, 19,074 gallons of gasoline, and 469,460 gallons of diesel oil.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is not entitled to recover, and the petition is therefore dismissed.

Appendix B.

Conflicting Opinion.

IN THE

UNITED STATES COURT OF CLAIMS

(Decided Nov. 6, 1951)

No. 48319

STANDARD-VACUUM OIL CO. v. THE UNITED STATES

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The court, having considered the evidence, the report of Commissioner W. Ney Evans, and the briefs and argument of counsel, makes the following

SPECIAL FINDINGS OF FACT

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CEBU CLAIM

36. In addition to the Pandacan terminals at Manila, on the Island of Luzon, three of the oil companies,[17] of which Standard was one, owned and operated terminals[18] on the Island of Cebu.

37. In November 1941, the Chief Quartermaster, USAFFE, arranged for the dispatch of an officer of the Quartermaster Corps to Cebu to establish and command an advance Quartermaster Depot. This depot commander was authorized and directed to procure supplies for

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[17] Standard, Caltex, and Shell.

[18] Standard's Cebu installation, known as the Opon terminal, included oil storage tanks, pipelines, pumping equipment, dock facilities, warehouses, can-making machinery, containers, and supplies of petroleum products. Only the supplies are in issue in Standard's Third Amended Petition.

USAFFE, including petroleum products, for use in the southern islands of the Philippines, and to exercise his discretion as to the manner of procurement.

Upon investigation the depot commander found that USAFFE had no bulk stocks of petroleum products in or near Cebu, and only a negligible amount of petroleum products in drums. It had been determined at USAFFE headquarters not to send supplies of petroleum products to Cebu from Manila. The only supplies of such products in the Cebu area were those of the oil companies.

38. On December 8, 1941, the Cebu depot commander called a meeting of representatives of the oil companies and declared (1) that in the name of USAFFE he was taking over all their supplies of petroleum products and (2) that he was freezing the price of such products at the current Army contract rate. He further stated that the oil companies would be allowed to take out a certain amount of stock from their terminals for the use of the local government and such civilian agencies as were essential to the economy.

39. Within a few days after December 8, 1941, the depot commander had established control over the oil companies' terminals and had placed military patrols. An order was issued by him that no petroleum products should be withdrawn without approval by him or his authorized representative.

Work was begun on the packaging of petroleum products in tins or drums and the removal of such products for use or for dispersal to warehouses and supply dumps for protection against possible enemy bombing.

Records were maintained of the amounts of petroleum stocks (1) removed and (2) on hand at the terminals. Petroleum products released to civilians or for civilian purposes were recorded as stock credits against the amount initially taken by and for the Army. The oil companies were permitted to charge for the amounts so released at prices obtaining for local civilian use.

During the course of this operation some bills were submitted by Standard to the Army for petroleum products removed from its Opon terminal for use or dispersal by the Army. It is not established by the evidence that any of such bills was or was not paid.

40. On April 10, 1942, the oil companies' terminals and the petroleum products remaining in them were destroyed by order of the depot commander pursuant to a prearranged demolition plan. The demolition was performed to prevent the facilities and supplies from falling into the hands of the enemy. Japanese forces were in the harbor when the demolition occurred, and began their landings on Cebu within hours thereafter.

41. Defendant has paid Standard for the petroleum products removed from Standard's Opon terminal for use or dispersal but has refused to pay for the petroleum products remaining in the terminal and destroyed with it. The products so remaining and so destroyed were on hand at the Opon terminal when the depot commander on December 8, 1941, took all of Standard's petroleum products in the name of USAFFE.

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OPINION

HOWELL, Judge, delivered the opinion of the court:

Plaintiffs in these three suits, which have been consolidated, are The Shell Company of Philippine Islands, Ltd., Standard-Vacuum Oil Company, and Caltex (Philippines), Inc., hereinafter referred to as Shell, Standard, and Caltex, respectively. All are corporate entities which, at the time this cause arose, were engaged in the commercial distribution of petroleum products in the Philippine Islands area. Each of the plaintiffs maintained storage and terminal facilities in the Pandacan District of Manila, P. I., and on the Island of Cebu.

All three oil companies are suing for just compensation for the taking of their terminal facilities at Pandacan (Findings 1 through 33).

Standard makes an additional claim for just compensation for petroleum products which were in its terminal at Cebu at the time the terminal was taken on December 8, 1941, by the depot commander in the name of USAFFE, and which were destroyed along with Standard's terminal on April 10, 1942. Standard is not making any claim for just compensation for the taking of its terminal facilities on Cebu (Findings 36 through 41).

Shell is suing for $3,943.20 for 131.44 metric tons of Diesel fuel oil sold and delivered by Shell, on or about April 3, 1942, to defendant at Cebu for use on United States Navy submarines. Defendant promised and agreed to pay the amount claimed but has not done so (Findings 34 and 35).

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CEBU CLAIM

In case No. 48319 plaintiff, Standard-Vacuum Oil Company, seeks to recover just compensation for the value of certain petroleum products destroyed on or about April 10, 1942, on the Island of Cebu to deny their use to the Japanese.

In addition to the Pandacan terminal at Manila on the Island of Luzon, Standard, Caltex, and Shell, each owned and operated terminals on the Island of Cebu. In November 1941, the Chief Quartermaster, USAFFE, arranged for the dispatch of an officer of the Quartermaster Corps to Cebu to establish and command an advance Quartermaster Depot. This Depot Commander was authorized and directed to procure supplies for USAFFE, including petroleum products, for use in the southern islands of the Philippines. He was authorized to exercise his discretion as to the manner of procurement. USAFFE had no bulk stocks of petroleum products in or near Cebu and only a negligible amount in drums. It had been decided at USAFFE headquarters not to send

supplies of petroleum products from Manila to Cebu. The only petroleum supplies in the Cebu area were those of the three oil companies.

Cebu is an island in the Philippine chain, located some 350 miles southeast of Manila.

On December 8, 1941, the Cebu Depot Commander, pursuant to his authorization mentioned above, called a meeting of the representatives of the three oil companies and informed them (1) that in the name of USAFFE he was taking over all their supplies of petroleum products and (2) that he was freezing the price of such products at the current Army contract rate. He stated that the oil companies would be permitted to take out a certain amount of stock from their terminals for the use of the local government on Cebu and for such civilian agencies as were essential to the Island's economy.

Within a few days after December 8 the Depot Commander had established complete control over the oil companies' terminals and had stationed military patrols thereon. He issued an order that no petroleum products could be withdrawn without approval by him or his authorized representative. Work was begun on the packaging of petroleum products in tins or drums and the removal of such products for use or for dispersal to warehouses and supply dumps for protection against possible enemy bombing.

Records were maintained of the amounts of petroleum stocks removed and the amounts on hand at the terminals. Petroleum products released to civilians or for civilian purposes were recorded as stock credits against the amount initially taken by and for the Army under the above-mentioned requisition. The oil companies were permitted to charge for the amount so released at prices prevailing for local civilian use.

On April 10, 1942, the oil companies' terminals and the petroleum products remaining in them were destroyed by order of the Depot Commander, pursuant to a demolition plan, to prevent the facilities and supplies from falling into

the hands of the enemy. Japanese forces were then in the harbor and began their landings on Cebu within hours after the demolition.

Defendant has paid Standard for the petroleum products removed from Standard's Opon terminal for use or dispersal by the Army, but has refused to pay for the petroleum products which remained in the terminal and were destroyed with it on April 10, 1942.[24] The products so remaining and so destroyed had been on hand on December 8, 1941, at the Opon terminal when the Army Depot Commander requisitioned all of Standard's petroleum products in the name of USAFFE.

It is the Government's contention that there was no taking of Standard's Cebu petroleum products on December 8, 1941, and that the action of the Depot Commander amounted merely to the establishment of a priority system for Standard's petroleum products. Accordingly, the Government concludes that if there was any taking at all it was a taking on April 10, 1942, for the sole purpose of destruction in the same manner that the Government took the Pandacan facilities on December 27, 1941.

Unlike the somewhat confused situation on Pandacan in December of 1941 relative to the authority of Quartermaster officials to requisition private property, the Quartermaster Corps official at Cebu was given authority in November of 1941 to procure supplies for USAFFE, including petroleum products, in any manner he found expedient. On December 8 the Depot Commander actually requisitioned these products. These facts are found by the Commissioner in Findings 37 and 38 and were not excepted to by defendant. The Depot Commander's actions permitting the oil companies to take out a certain amount of their stock for the use of the local government and their civilian agencies, subject to the

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[24] Standard's Cebu installation, known as the Opon terminal, included oil storage tanks, pipe lines, pumping equipment, dock facilities, warehouses, can-making machinery, containers, and supplies of petroleum products. Only the supplies of petroleum products are in issue in Standard's Third Amended Petition. Shell and Caltex have not made any claim with respect to their Cebu properties in this proceeding.

approval of the Depot Commander, were not inconsistent with an act of taking or requisition. As of December 8, 1941, when the Army took title to the petroleum products in Standard's Opon terminal, it did not take them for destruction. It took them and used them for approximately four months. The products which were destroyed by the Army on April 10, 1942, had been in existence and in the Opon terminal on December 8, 1941, the date of taking.

We conclude that the Depot Commander, with full authority to do so, took Standard's petroleum products for the United States on December 8, 1941, not for destruction, but for use, and Standard is clearly entitled to just compensation for its products so taken.

* * * * * *

Caltex, Standard, and Shell are entitled to recover for the taking of their terminal facilities on Pandacan, and Standard is entitled to recover for the taking of its petroleum products on Cebu, the exact amounts being reserved for further proceedings under Rule 38 (c).

It is so ordered.

MADDEN, Judge, *and* LITTLETON, Judge, concur.

JONES, Chief Judge, dissenting in part:

There are times when age-old, time-honored principles of law seem to meet head on in hopeless conflict.

It is written that private property may not be taken for public use without just compensation.

On the other hand it is well recognized that property destroyed in actual battle by either side does not call for compensation. It is held that all property and human rights may be the victim of battle conditions. If the battle is lost all may be lost.

Between the application of these two recognized principles is a twilight zone the boundaries of which are difficult to determine. The differences are factual rather than fundamental.

In this uncertain zone that cannot be measured by a mathematical yardstick the facts of this case fall.

Were plaintiff's permanent installations taken for public use or was the destruction the inevitable result of substantial battle conditions?

The defendant has seen fit to admit that the vehicles, the gasoline, and movable articles were taken and has paid for them or admitted liability, but insists that the buildings and permanent fixtures fall in a different classification.

In *United States* v. *Pacific Railroad*, 120 U. S. 227, Mr. Justice Field gave extended consideration to the question now before this court. That case arose out of the destruction of railroad bridges by Federal armies during the Civil War; the bridges were destroyed to impede the advance of the enemy. Later, again in response to military necessity, the bridges were rebuilt by the United States. The United States sought to charge the railroad for the cost of rebuilding by withholding that amount of money due the railroad for transporting passengers and freight. The railroad sued for the full amount of the transportation charges. The Court decided that it was entitled to recover that amount. Recovery, however, was not based on the Fifth Amendment. The destruction created no cause of action in the railroad; neither did the rebuilding create a cause of action in the United States; both were dictated by military necessity. Where the parties were left by the fortunes of war, there were they left by the Supreme Court.

At page 239:

> While the Government cannot be charged for injuries to, or destruction of, private property caused by military operations of armies in the field, or measures taken for their safety or efficiency, the converse of the doctrine is equally true, that private parties cannot be charged for works constructed on their lands by the government to further the operations of its armies.

The *Pacific Railroad* opinion was a careful and deliberate attempt to sum up the legal consequences of destruction of private property pursuant to the dictates of military

necessity. Mr. Justice Field's discussion of whether the railroad could have recovered in an action for compensation for the destruction of the bridges was not strictly necessary to disposition of the issue in the case. But it cannot be dismissed as merely gratuitous. As he viewed the case, a proposition and its converse were both involved and both had to be discussed. If not decisive of the issue now before us, his discussion is at least strongly persuasive. It has persuaded me that the demolition of the Pandacan facilities in World War II was, like the destruction of the railroad bridges in the Civil War, a destruction of private property "during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency * * *" *Ibid.* If the railroad bridges were not "taken for public use", then neither were the oil terminal facilities at Pandacan. Admittedly, the question now before us was not as squarely presented in *Pacific Railroad* as in *Grant* v. *United States,* 1 C. Cls. 41. But the Supreme Court in *Pacific Railroad* was not unaware of the *Grant* case. That case as well as *Wiggins* v. *United States,* 3 C. Cls. 412, had been cited in the railroad's brief to the Supreme Court. These early Court of Claims cases did not sway the Supreme Court in 1887; I do not believe they should sway us now.

The majority has stated:

> The Government does not attempt to insure its citizenry from losses due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign. But when it is determined that a specific person's property because of its nature or location is so essential to war effort that it must be taken and put to use for the good of the nation, it is our belief that the public generally should bear the cost of acquisition.

With that statement I agree. It is with its application that I quarrel. I think it has been applied here in a most unrealistic way. I think we have here not a case of taking

and putting to use of property but rather a case of property destroyed in the conduct of a campaign.

While controls were thrown around the property in question on December 12, 1941, the actual notice of taking was not given until December 28, and it was then made clear that it would be destroyed. At that time the Japanese were at the outskirts of the city of Manila. There was no hope of saving the property. If the city were further defended, the property would undoubtedly be destroyed. If it fell into the hands of the Japanese it would certainly be destroyed before they gave it up. In fact, practically all Manila, residential and otherwise, was destroyed in the process of retaking three years later. Any possible value to the plaintiffs was gone whichever horn of the dilemma is taken.

The situation was hopeless from a military viewpoint and the army was withdrawn to Corregidor. The property was so near to the battle zone border as to be for all practical purposes within its flaming presence if not actually in it.

The Pandacan installations were demolished almost at the very moment before retreat. The demolition was a defensive action, and an important one. As such, it was inextricably a part of the tragic battle then taking place on the island of Luzon. I do not know how to disassociate that action from the pattern of the battle. I think an appreciation of the realities of the situation requires us to hold that plaintiffs' properties were destroyed in the course of that battle.

The demolition occurred on December 31, 1941. By January 2, 1942, Manila was under Japanese control. Had the oil terminal facilities fallen intact to the enemy and thereafter been destroyed by United States forces, by bombing, shelling, or other military action, admittedly plaintiffs would have no claim for compensation. Nor would they have a claim for compensation if the enemy had destroyed the property. Of course, had we waited until Manila fell to attempt to destroy the installations, it is not likely that

the destruction would have been as effective. Our forces chose the surer mode and time of destruction. The deliberateness of this choice, the fact that plaintiffs' properties were singled out for destruction, seems to have influenced the majority's conclusion that the destruction was a Fifth Amendment taking. I think, however, that it only emphasizes the military nature of the destruction.

This court has been zealous in upholding the force of the eminent domain provision of the Fifth Amendment. We have not been unmindful of the principle that the Amendment is not suspended in time of war, and I do not propose that we should be. However, a scrupulous regard for the Amendment does not require us to ignore the realities; it does not require us to say that property destroyed by military action was "taken for public use." I think that the loss for which compensation is sought here, considered in its context of time and place, must be regarded in law as what it was in fact—a loss incident to battle, a loss, in the words of the majority's opinion, "inflicted by our own or enemy forces in the conduct of a campaign."

The law is based on reason. It is based on human experience. It is the result of centuries of effort on the part of the brightest minds, both legislative and judicial, to secure rules of action that will assure justice in disputes between individuals as well as between citizen and government.

Applying the rule to a very difficult situation we are unable to find within the range of reason any just ground for allowing compensation for the permanent installations. It was one of the darkest periods of World War II. The Japanese advance at that time seemed irresistible. Shells were bursting in the city. Within a matter of hours everything would have been in the hands of the enemy and our outnumbered army captured or destroyed, had it not been withdrawn to Corregidor. I can reach no other conclusion than that the destruction was due to battle conditions.

I dissent from the decision that plaintiffs' properties were taken for public use within the meaning of the Fifth Amendment.

I would allow the Shell Company of Philippine Islands, Ltd., to recover the sum of $3,943.20 for products sold and delivered to defendant at Cebu, and which have not been paid for. I would dismiss the other claims of each of the plaintiffs.

Judge Whitaker joins in the foregoing dissenting opinion.

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QUESTION PRESENTED

On December 8, 1941, immediately following the commencement of war with Japan, a representative of the United States Army assumed control over the distribution of petitioner's stocks of petroleum products in its supply terminal on Cebu in the Philippines. The question is whether the Court of Claims, upon its findings as to the circumstances of this action, correctly concluded that no taking compensable under the Fifth Amendment then took place.

STATEMENT

This is a suit brought by petitioner in the Court of Claims seeking to recover just compensation under the Fifth Amendment for certain petroleum products located at the time of the outbreak of war with Japan in petitioner's supply terminal on the island of Cebu in the Philippine Islands. The United States has paid petitioner for supplies withdrawn from the terminal by the Army. This suit involves only supplies which were destroyed in the terminal on December 22 and 30, 1941, by enemy air raids, and on April 10, 1942, by the Army, to prevent them from falling into the hands of the invading Japanese. Petitioner claims that these oil stocks had been seized by the Army on an earlier date, *i. e.*, on December 8, 1941, so that, when destroyed, they were Government property. The Court of Claims held unanimously, however, that there had

been no taking on December 8, 1941. (Pet. App. 20–22.) It held further that the Army officer who allegedly had seized the property was without authority to requisition private property (Pet. App. 22–23), and that his actions were not at any time ratified as a requisition by anyone having the requisite authority. The court, accordingly, dismissed the petition. (Pet. App. 24, 32.) The pertinent facts may be summarized as follows:

At the time of the Japanese attack on Pearl Harbor, petitioner was one of four commercial oil companies maintaining a supply terminal at Pandacan (Manila), and auxiliary facilities at Cebu, in the Philippine Islands (F. 1; Pet. App. 24–25). The defense plans for the Philippine Islands prepared by the Commanding General, Philippine Department, during 1940–1941, called for military utilization of privately owned stores of petroleum products in the event of an emergency, and no large reserves of such products were maintained by the United States Army in the Philippine area (FF. 4–6; Pet. App. 25–26). The representatives of petitioner and the other oil companies were fully conversant with these plans (FF. 6, 8; Pet. App. 26, 27), and they had agreed to make their personnel and facilities available to the Army in the event of emergency (F. 8; Pet. App. 27). During the period prior to December 7, 1941, the Army's plan for military control over and utilization of private petroleum stocks was customarily referred to by the oil

company representatives, and many Army officers, in terms of the Army "taking over" in the event of war (FF. 6, 8; Pet. App. 26, 27).

In November 1941, Colonel John D. Cook was ordered to activate and command an advanced Quartermaster depot on the Island of Cebu, about three hundred and fifty miles south of Manila, to supply units of the Philippine Army which were to be mobilized in that area (F. 12; Pet. App. 28). As commander of the depot, Colonel Cook was responsible for procurement, storage, and distribution of supplies in the southern islands (F. 12; Pet. App. 28–29). He lacked the power unless and until specifically granted by higher authority to seize or commandeer private property, and was required by Army regulations to purchase the supplies which he obtained in the area from private sources (F. 12; Pet. App. 29).

After the outbreak of war between Japan and the United States, Colonel Cook, then in Manila, was instructed to return to Cebu and procure supplies in any manner he saw fit (F. 13; Pet. App. 29). It was not established that the officer who gave these instructions had the power to requisition or the authority to delegate such power, or that such power was delegated to Colonel Cook by the area Commanding General or by any other officer commanding a theater of operations (F. 13; Pet. App. 29).

Upon his return to Cebu on December 8, 1941, Colonel Cook informed the representatives of

petitioner and of the other oil companies that he was "taking over" their petroleum supplies and such facilities as were necessary to make use of them; that he was freezing the price of the various products on hand at the level of the contract price in the Manila depot; and that the oil companies would be allowed to withdraw only such oil as was needed for essential public and civilian operations (F. 14; Pet. App. 29). Incident to this action, Colonel Cook requested the oil companies to place guards on their properties until military patrols could be furnished; such military patrols were furnished within a few days (F. 17; Pet. App. 30). In addition, he requested the oil companies to place the petroleum stocks in containers (large metal drums and smaller cans) so that as much as possible might be removed from the terminal and dispersed (F. 18; Pet. App. 30).

The dispersal of the petroleum products in containers was continued intermittently as cans and drums could be found (F. 19, Pet. App. 30). A substantial portion of the products not removed from the terminal were destroyed by enemy air raids on December 22 and 30, 1941 (F. 23, Pet. 31). Late in March, 1942, the supply of containers was exhausted (F. 19, Pet. App. 30). At that time, the Army's requirements were being supplied from the dispersal dumps on Cebu (F. 19, Pet. App. 30). When the movement of packaged products was stopped, an unspecified quan-

tity of oil at petitioner's terminal had been packaged but not removed (F. 19, Pet. App. 30–31).

Plans for the destruction of the supply terminals, including the facilities and all petroleum stocks remaining in them, to prevent their falling into the hands of the enemy, were made by Colonel Cook. Early in the morning of April 10, 1942, when Japanese troops were just offshore and beginning their landings on Cebu, the plans were executed. Petitioner's supply terminal and all of the petroleum products remaining in it were destroyed. (F. 20, Pet. App. 31.)

The evidence did not establish that Colonel Cook intended on December 8, 1941 to requisition (in the sense of seizing or commandeering) the oil supplies of petitioner (F. 15; Pet. App. 29–30). He did intend to conserve them; to use such of them as might be needed; and to make payment at a stated price (F. 15; Pet. App. 30). Although his actions deprived petitioner of control over its oil products, they did not deprive it of its interest in that property (F. 16; Pet. App. 30). Petitioner was permitted to sell its petroleum products to approved private purchasers and public institutions and to receive payment therefore, without making any account to the Army (Pet. App. 20–21).

Petitioner kept a record of all stocks withdrawn by the Army from its terminal in containers (F. 18; Pet. App. 30), and the

Government has paid petitioner for the stock thus appropriated to its use (F. 21; Pet. App. 31). The Government, however, refused to pay petitioner for such of its stocks as were destroyed by Japanese air attacks on December 22 and 30, 1941, and as were destroyed by the Army on April 10, 1942, as the Japanese were beginning to land on Cebu (FF. 20, 23, 25; Pet. App. 31–32). It was to recover just compensation for these stocks, on the theory that the Government had taken them for public use on December 8, 1941, that the instant suit was brought.

ARGUMENT

The decision of the Court of Claims rests upon its determinations of fact and is correct. No relevant conflict of decisions is presented. Review by this Court is therefore not warranted.

1. The Court of Claims found that "It is not established by the evidence that Colonel Cook intended, on December 8, 1941, to requisition (in the sense of seizing or commandeering) the oil supplies of [petitioner] and the other companies" (F. 15, Pet. App. 29–30), but intended only to impose reasonable restrictions on their distribution and price (F. 15, Pet. App. 30; Pet. App. 20–21). Colonel Cook's action in freezing the price which the oil companies could charge for their products and his order permitting them to sell and receive payment for supplies sold to

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essential non-Army users is inconsistent with appropriation. The fact that petitioner was not required to account to the Government for oil products sold to such non-Army users is inconsistent with the alleged Government ownership of the stocks involved. To the same effect, petitioner kept its own account of the petroleum products withdrawn by the Army (F. 18, Pet. App. 30), which it would hardly have done if it at the time understood that title to the entire stock had passed to the Government. Finally, it is undisputed that the Army in fact used only that portion of the supplies which were withdrawn for its account and removed to dispersal points and that the Government has paid petitioner in full for the supplies thus withdrawn (Pet. App. 21; F. 21, Pet. App. 31). Indeed, there would have been no point in the Army's seizing oil stocks which, owing to the lack of containers to remove them to dispersal points (F. 19, Pet. App. 30), it could not have used. Thus the court's conclusion that Colonel Cook's "taking over" of the oil stocks meant only that he was assuming control over their distribution to prevent dissipation in non-essential uses and that he did not intend to appropriate supplies the Army could not use (Pet. App. 20–21) is fully supported by the record and is clearly correct.

The court's holding that there was no compensable taking by the United States followed as a matter of course. The exercise of control over

and the placing of restrictions on the disposition of private property for the purpose of conserving it in time of public necessity do not result in a Fifth Amendment taking. See *e. g., Bowles* v. *Willingham,* 321 U. S. 503; *L. P. Steuart & Bro., Inc.* v. *Bowles,* 322 U. S. 398; *St. Regis Paper Company* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; *Oro Fino Consolidated Mines, Inc.* v. *United States* 118 C. Cls. 18, certiorari denied, 341 U. S. 948; cf. *Ommia Commercial Co.* v. *United States,* 261 U. S. 502; *Block* v. *Hirsch,* 256 U. S. 135.[1]

2. The court's conclusion that petitioner is not entitled to recover is buttressed by its further findings that Colonel Cook had not been authorized to requisition private property and that no one having such authority viewed his action as a requisition, and as such ratified it.

(a) Although Colonel Cook was instructed to procure supplies, including fuel, "in any manner

[1] The cases first cited on page 13 of the petition are authority only for the proposition that the Government must pay just compensation for property which it takes by forced sale. As already indicated, petitioner has been paid for the petroleum sold to the Army and removed from its Cebu terminal, and does not claim additional compensation for such property. (F. 21; Pet. App. 31.) Similarly distinguishable is *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (Pet. 14); in *Pewee*, the court found that the Government had taken possession and operating control of the company and become the proprietor thereof (see, *e. g.*, 341 U. S. at 118), whereas here the Court of Claims expressly found that Colonel Cook's action did not deprive petitioner of its interest in its property (F. 16; Pet. App. 30).

he saw fit" (F. 13; Pet. App. 29), the court below held that the evidence does not establish "that the officer who gave him these instructions had the power to requisition, or the authority to delegate the power of requisition," or that "a delegation of authority to seize private property in Cebu was made by the Commanding General of USAFFE[2] or other officer commanding a theater of operations" (F. 13; Pet. App. 29). In the absence of such authority, it is very doubtful whether, even if Colonel Cook purported to requisition the oil stocks, the United States could be required to pay just compensation. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 585; *Hooe* v. *United States,* 218 U. S. 322, 335–336; *United States* v. *North American Co.,* 253 U. S. 330, 333.

Petitioner attempts to contradict this finding by suggesting without elaboration that the testimony in the record "supports a reasonable inference that [Cook's] instructions came directly from General MacArthur's Headquarters" (Pet. 4, fn.). But the record is devoid of any evidence that Colonel Cook was given requisitioning power by any one with the requisite authority. In the absence of such a delegation of authority, Colonel

[2] United States Armed Forces in the Far East, created on July 28, 1941, with General Douglas MacArthur in command. The Philippine Department, United States Army was continued in the echelon of command under Headquarters, USAFFE. (F. 9; Pet. App. 27.)

Cook was without such power, as is clear from paragraph 21 of the Quartermaster Field Manual (Def. Ex. 9),[3] and the pertinent USAFFE administrative order, effective December 1, 1941.[4] Moreover, even if there were a conflict in the evidence, its resolution was for the Court of Claims. Questions of fact fully resolved by the Court of Claims are not reviewable by this Court. See, *e. g.*, *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205; *United States* v. *Omaha Tride of Indians*, 253 U. S. 275, 281; *United States* v. *Russell*, 13 Wall. 623, 631.

(b) Petitioner makes no claim, other than in the footnote quoted above, that the authority to requisition was in fact delegated to Colonel Cook. Petitioner urges rather that under *Mitchell* v. *Harmony*, 13 How. 115, Colonel Cook had extraordinary authority to seize, and to bind the United States to pay for, all of petitioner's Cebu oil stocks because of the existence of an "emergency" or a condition of "urgent necessity" at Cebu

[3] Paragraph 21 of the Quartermaster Field Manual provides that "requisitions are resorted to only when authorized in orders of the commander of the theater of operations."

[4] The administrative order established a quartermaster "depot" at Cebu. As a depot commander, under the applicable regulations (see n. 3, *supra*), Col. Cook did not have the power to commandeer or requisition. (Tr. 459–462, 478–482.) For additional details as to Colonel Cook's authority, see *Anderson, Clayton & Co.* v. *United States*, 122 F. Sup. 835, C. Cls. No. 48313, Finding 14, decided July 13, 1954, the same day as the instant case and involving comparable issues. Certiorari has not been sought in the *Anderson* case.

on December 8, 1941, following the commencement of hostilities with Japan (Pet. 15–16). But this claim too, as held by the court below, is without merit.

In *Mitchell* v. *Harmony, supra,* this Court held that one Mitchell, acting pursuant to an order of his superior, Colonel Doniphan, was not justified in seizing certain wagons, notwithstanding the fact that the United States was at war with Mexico, that Colonel Doniphan was the leader of an expeditionary force outside the United States, that he was at the time actively preparing to attack and invade Chihuahua, that he seized the wagons in good faith to promote the public service, and that he subsequently made the invasion with the help of those wagons. While the Court suggested that there might be circumstances under which a military officer, without prior authorization from the civil authorities, could lawfully impress private property into the public service and bind the Government to pay just compensation therefor, it said that such authority would exist only under conditions of urgent necessity (*id.,* at 134–135):

> we are clearly of opinion that * * * the danger must be immediate and impending; or the necessity for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occa-

> sion calls for. * * * Every case must depend upon its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

This Court has since noted that the language of its opinion in this case is "far broader" than its holding. *United States* v. *Caltex (Philippines), Inc.*, 344 U. S. 149, 152–153. But even assuming it correctly states the law, it is clear that there is here no emergency such as the Court there contemplated. The Cebu supply depot was located 350 miles from the point of attack on Luzon. Colonel Cook, the local commander, was in regular telephone, radio and plane communication with his superiors on that date and for weeks thereafter.[8] The oil companies had previously agreed to make their personnel and facilities available if the Army "took over" in the event of war (F. 8, Pet. App. 27). The supplies for which compensation is here sought consist solely of that portion of petitioner's bulk oil stocks which the

[8] See *Anderson, Clayton & Co., Inc.* v. *United States*, 122 F. Supp. 835, C. Cls. No. 48313, Finding 14*d*: "Telephone communications between the Cebu Depot, USAFFE Headquarters in Manila, and the USAFFE Field Service Command in Manila were intact up until the evacuation of Manila on December 24. Thereafter, up until the invasion of Cebu on April 10, 1942, the Cebu Depot and USAFFE Headquarters on Corregidor were in frequent communication by radio and air messenger service."

Army, because of the lack of containers (F. 19, Pet. App. 30), could not use. The supplies which it could and did use have long since been paid for by the Government (F. 21, Pet. App. 31). There was no "risk of the Army losing the only possible source of petroleum supply at Cebu" as suggested by petitioner (Pet. 17), for the obvious reason that the petitioner was, so to speak, in the same boat as the Army. Thus the court below concluded (Pet. App. 22):

> * * * certainly no emergency has been shown to have existed on December 8, 1941, which on that date would have authorized Colonel Cook to seize [petitioner's] products, on [petitioner's] refusal to sell them.

Nor is there any evidence that Colonel Cook's action on December 8, 1941, was at any time ratified as a requisition of petitioner's oil stocks by anyone having authority to requisition such property (Pet. App. 24).

3. Petitioner makes a general attack on the findings below by pointing to the contrary findings in *Caltex (Philippines), Inc.* v. *United States,* 120 C. Cls. 518, 535–537, 551–553, reversed as to another issue, *United States* v. *Caltex (Philippines), Inc.,* 344 U. S. 149. There the Court of Claims held that Colonel Cook's exercise of control over the oil stocks of Standard-Vacuum, one of the other companies with a petroleum supply termi-

nal on Cebu, did result in a Fifth Amendment taking. Petitioner suggests that this results in a "conflict" calling for review by this Court (Pet. 6–12). But the fact that the Court of Claims has in the decision below unanimously and expressly overruled certain parts of its decision in a prior case does not create such a conflict. This is not comparable to a conflict between different panels of the same circuit, such as has on occasion moved this Court to grant certiorari.

As the Court of Claims explained, the earlier case involved principally the claims of various oil companies for just compensation for the destruction by the Army of their Pandacan facilities at Manila, with Standard's Cebu claim being a subsidiary issue (Pet. App. 24):

> The attention of the court was centered on the Pandacan claim; but we did allow recovery for Standard's oil products on Cebu on the theory that there had been a taking of them by Colonel Cook on December 8, 1941. This was in error, and to the extent that the opinion and decision in that case is inconsistent with what we have said above, they are overruled.

While much of the evidence as to Colonel Cook's conduct and authority was the same in the two cases, the court below in the instant case had

the advantage of additional evidence on the critical issues.[*]

Moreover, this Court's reversal of the Court of Claims on the principal issue in the earlier case obliged the latter to reconsider its ruling on the subsidiary issue which the Government, in order to focus attention on the principal issue, had not sought to have reviewed. (See petition for certiorari, p. 2, n. 1, in No. 16, O. T. 1952, *United States* v. *Caltex* (*Philippines*), *Inc.*, 344 U. S. 149.) As noted above, the central issue in the earlier case concerned the Government's liability for the value of certain oil terminal facilities at Manila which were destroyed by the Army on December 31, 1941, in order to deny them to the enemy. There, as here, the oil companies relied, *inter alia*, on the assumption of control by the Army over the facilities prior to their demolition to make out a compensable taking. But this Court held that the exercise of "control" over the facilities before devastating them was in effect "no more than a design to prevent the enemy from realizing any strategic value from an area which he was soon to capture" (344 U. S. at 154–155).

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[*] For example, the Quartermaster's Field Manual, delineating the scope of Colonel Cook's authority (see *supra*, pp. 10–11), in evidence in this case, was not before the court in the prior proceeding.

CONCLUSION

The decision of the Court of Claims is fully supported by the record and is in accord with applicable principles. There is no conflict of decisions warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955

JAN 15 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 474.

CALTEX (PHILIPPINES), INC.,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF

Introduction.

The petition (page 3) contains a footnote reference to a pending Government motion in the United States Court of Claims to be relieved from the determination of that Court in *Standard-Vacuum Oil Company* v. *United States,* 120 C. Cls. 518, 551-553. There the Court held "that the Depot Commander (Colonel Cook), with full authority to do so, took Standard's petroleum products for the United States on December 8, 1941, not for destruction, but for use, and Standard is clearly entitled to just compensation for its products so taken"* (Pet. App., p. 39). Since the filing of this petition and on January 11, 1955, the aforesaid motion was granted by the Court of Claims which set its former judgment aside and referred the case to a Commissioner "to take proof and report the amount due in accordance with this opinion."

* Material in parentheses added.

Argument.

Respondent, in its brief in opposition to this petition for certiorari, argues that the decision below is correct in that (1) the taking of petitioner's products is not one which is compensable under the Fifth Amendment and (2) under the circumstances of this case, Colonel Cook lacked authority to take petitioner's property.

1. In the petition herein (pp. 12-14) it was shown that the cases relied on by the Court below in holding that there was no compensable taking of petitioner's property are not controlling on the facts here presented. In its brief respondent relies on the same cases. It also cites other cases which likewise are not in point (Br., p. 9). The additional cases* hold only that consequential damage to private property arising out of the valid exercise of a sovereign power is not compensable under the Fifth Amendment. There was nothing consequential about the damage herein; petitioner's damage was immediate and direct damage, intentionally inflicted on petitioner by premeditated Army action. On and after December 8, 1941 the petroleum products here involved were under the exclusive control of the Army (F. 16; Pet. App., p. 30). While under Army control they were destroyed. This is in no sense consequential damage.

The only other case cited by respondent in support of its argument that the taking of petitioner's property is non-compensable is *United States* v. *Caltex (Philippines), Inc.*, 344 U. S. 149 (1952). Respondent argues (Br., p. 16) that this Court there held that the Army's exercise of control over private property prior to destruction does not

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* *L. P. Steuart & Bro., Inc.* v. *Bowles*, 322 U. S. 398; *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, cert. den. 341 U. S. 948; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502 and *Block* v. *Hirsh*, 256 U. S. 135.

constitute a compensable taking. It is clear from this Court's opinion that the period of control which the Court referred to amounted to only a few days. Thus the Court stated: "Accordingly, it is the legal significance of the events that occurred between December 27 and December 31 which concerns us." 344 U. S. 149, 152. The situation in the case at bar is entirely different; here the Army exercised exclusive control over petitioner's property from December 8, 1941 to April 10, 1942, a period of over four months, before it destroyed the property. What this Court held in the earlier *Caltex* case with respect to a taking for the sole purpose of destruction is in no way controlling on the facts here presented.

Respondent's argument that there was no compensable taking is unsound for other reasons. Thus it states that petitioner was not required to account to the Government for products delivered to non-Army users (Br., p. 8), and from this premise argues that the Army's failure to require accounting is inconsistent with a government taking. This argument must fall since the premise is false. The record herein clearly establishes that petitioner was required to give the Army a stock-credit for products which the Army directed to be delivered to certain essential public services (Cook, 127; see also Finding 39 in the *Standard-Vacuum* case, Pet. App., p. 34).

Respondent also argues that if all products in petitioner's Opon terminal were taken by the Army on December 8, 1941 and petitioner no longer had title to the products, there was no need for it to keep records of the products subsequently withdrawn by the Army (Br., p. 8). If the keeping of records is evidence of title, then under respondent's own theory the Army's acts after December 8, 1941 clearly establish that it took title to all the products on that date. After December 8, 1941 the Army kept rec-

ords of both bulk products in the Opon terminal and products withdrawn from it (Cook, 112-113). These records were subsequently destroyed (Cook, 113). Had petitioner failed to keep records, it would have been unable to prove its damages either in this action or in the action which it commenced to recover for the products withdrawn from the terminal by the Army (Petition, para. 7; Answer, para. 6). However, the keeping of such records hardly proves that the products here involved were not taken.

Finally, in support of its argument that the taking of petitioner's products was non-compensable, respondent contends that "there would have been no point in the Army's seizing oil stocks which, owing to the lack of containers to remove them to dispersal points (F. 19, Pet. App. 30), it could not have used" (Br., p. 8). The taking here involved occurred on December 8, 1941. It was not until late in March 1942 that the supply of containers became exhausted (F. 19, Pet. App. 30). There is no evidence that anyone knew on December 8, 1941 how long the supply of containers would last or least of all that anyone knew it would become exhausted the following March. Respondent's argument is based on hindsight and not on events known to exist on December 8, 1941, the date of taking. Whether or not there was a taking must be determined as of that date.

2. It is obvious from its brief that respondent completely misunderstands the third reason urged for granting the writ of certiorari herein. At pages 15-17 of the petition it has been shown that in its recent decisions (including the instant case) the Court of Claims has misconstrued the rule enunciated by this Court in *Mitchell* v. *Harmony*, 54 U. S. 115 (1851) and has eliminated from consideration one of the situations (the necessity for public service) in which an Army officer during wartime can bind

the government to make just compensation for property which he takes to supply his troops. Respondent ignores this contention. Instead it goes even further than the Court of Claims and suggests that without a specific formal delegation of authority, no Army officer can bind the government to pay just compensation for property which he takes to supply his troops in wartime (Br., p. 10). In support of this proposition, respondent cites, among other cases, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952). In his concurring opinion in that case, Mr. Justice Douglas carefully noted that "Wartime seizures by the military in connection with military operations (cf. *United States* v. *Russell*, 13 Wall. 623) are also in a different category" from the ordinary case of condemnation of property where Congressional authority for the taking is required (343 U. S. 632). It is this extraordinary case of a wartime seizure that is here involved. The rule to be applied is that announced by this Court in the *Mitchell* case. It is important that this Court grant certiorari and reassert the rule it established in *Mitchell* v. *Harmony*.

Conclusion.

For the reasons set forth in the petition and amplified herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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